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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROBERT FARRIS, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B186232 (Los Angeles County Super. Ct. No. BC239423)

APPEAL from the judgment of the Superior Court of Los Angeles County. Joanne O'Donnell, Judge. Affirmed.

Law Office of Mark J. Leonardo and Mark J. Leonardo, for Plaintiff and Appellant.

Gutierrez, Preciado & House, Calvin House and Clifton A. Baker, for Defendants and Respondents.

Robert Farris appeals from the summary judgment against him in his religious discrimination lawsuit against his employer, Los Angeles County, and several supervisors. We affirm.

FACTS AND PROCEDURAL HISTORY

Appellant Robert Farris started working for respondent Los Angeles County as a deputy probation officer in 1985. In 1996, he was assigned to Camp Afflerbaugh in the county's juvenile camp system. During the fall of 1997, a juvenile camp ward painted a mural of Jesus Christ on a camp dormitory wall. In addition, a group of juvenile wards called the Ensemble, which appellant characterizes as a Christian youth group, received special privileges from camp administrators, such as the right to leave camp to speak to high risk youth. Farris, who as an agnostic avows no knowledge of whether there is a God and therefore practices no particular religion, filed grievances in the fall of 1997 and spring of 1998 with county officials about the mural and the Ensemble. He argued their existence violated county policy and the separation of church and state.

Appellant alleges that after he filed his grievances, respondent camp directors Woodrow Cox and Terry Landrum and senior deputy probation officers Alphonso Barnes, Richard Fort, and Victor Holder began a years' long campaign of religious discrimination, harassment, and retaliation against him. According to him, they enforced work rules more stringently against him than other employees and reduced the number of juveniles for which he was responsible, thus diminishing his status among his peers and juvenile wards. (We discuss respondents' purported misdeeds in more detail below.)

In the meantime, the probation department instituted a new overtime policy in 1998. In the preceding five years, the department's overtime costs had increased almost 300 percent. In the fall of 1997, the county investigated how to control its skyrocketing costs. Following its investigation, the county required probation department managers to be less generous in allowing overtime, which included assigning overtime to less expensive junior staff instead of higher paid senior staff. With the new restrictions in place, the department reduced its annual overtime costs from $22 million to $10 million.

Appellant, who enjoyed working overtime and clocked 40 to 150 extra hours each month in 1997, saw his total overtime in 1998 fall to 87 hours.[1]

In October 2000, appellant sued respondents County of Los Angeles, camp directors Woodrow Cox and Terry Landrum, and senior deputy probation officers Alphonso Barnes, Richard Fort, and Victor Holder. The gist of his complaint was the defendants had violated the Fair Employment and Housing Act by retaliating against him and harassing him for complaining about the mural and the Ensemble. He alleged causes of action for religious discrimination; religious harassment; failure to accommodate; retaliation; and failure to prevent discrimination, harassment, and retaliation. (Gov. Code, § 12940 et seq.) He also alleged causes of action for retaliation against a whistle blower (Lab. Code, § 1102.5), and defamation.[2]

In February 2002, respondents moved for summary judgment, which the trial court granted despite appellant's request for more time to conduct discovery to oppose respondents' motion. The court found no religious discrimination or harassment for, among other reasons, respondents did not know appellant's religious affiliation. It further found no admissible evidence that respondents had retaliated against appellant for his having complained about the mural and Ensemble. Finally, it found respondents had not defamed appellant because all the statements he attributed to them were privileged comments made in connection with their jobs or were otherwise privileged. In an unpublished decision in April 2004, we reversed the trial court. In our opinion, we found

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[1] Appellant alleges his overtime fell because respondent Cox admitted "blackballing" him from working overtime. The deposition testimony by Cox that appellant cites was not before the court when it granted summary judgment. In any case, Cox did not testify he blackballed appellant; he instead testified he told supervisors to assign overtime to appellant only in an emergency.

[2] Appellant's amended complaint filed in February 2001 is the operative complaint in the record.

the trial court had erred by refusing appellant's request for more time to pursue discovery.

We issued our remittitur in June 2004 and remanded the case to the trial court. The case was assigned to a new judge, who in September 2004 scheduled a trial for the summer of 2005. In February 2005, respondents filed a new motion for summary judgment to be heard in April. In the meantime, the court ordered the parties to mediation and to report on the mediation at a status conference on March 10, 2005.

On March 10th, appellant informed the court no mediation had occurred because respondents refused to pay for a mediator. That day, appellant served his first notice of deposition since our remittitur issued the previous June. In the following weeks, the parties continued trying to settle the case. On March 31, appellant stopped pursuing discovery while settlement negotiations were pending, calling his self-imposed halt an "abatement period." The next day appellant requested ex parte that the court continue the summary judgment hearing and extend the discovery cut-off while the parties discussed settlement. Respondents apparently did not object to appellant's request and the court continued the summary judgment hearing to May 25, 2005. For reasons not clear in the record – although we surmise it was because the parties could not settle the case – appellant on April 20 ended his abatement period and started taking depositions. From then until May 23, he took the depositions of 14 witnesses over 19 sessions.

On May 10th, appellant moved ex parte for a second continuance of the summary judgment hearing to give him time to complete his remaining depositions and file his opposition to respondents' motion due the next day. The court denied a continuance. It noted appellant had had 23 months to conduct discovery: 15 months before entry of the first summary judgment (later reversed on appeal), and 8 months following the case's remand to the trial court. Furthermore, the court found appellant identified no essential facts for which he needed additional discovery to oppose respondent's motion for summary judgment.

Two days later on May 13th, appellant again moved ex parte to continue the summary judgment hearing and for leave to file a late opposition to respondents' motion.

He argued that our opinion in his previous appeal established as law of the case his right to whatever extra time he needed to complete discovery. The court declined to postpone the hearing. Having been refused leave to file a late opposition, appellant filed an incomplete one instead, consisting solely of a memorandum of points and authorities; he filed no separate statement of disputed and undisputed facts or supporting exhibits, so that instead of citations to evidence, many of his memorandum's factual assertions recite only "[PDF No. *]" for support. In addition, he filed 65 objections to respondents' evidence supporting summary judgment; he has not, however, included in the appellate record the first 12 of his 14 pages of objections, meaning only 8 of the objections are in the record.

The trial court heard the summary judgment motion on May 25, 2005. At the hearing, the court denied appellant's renewed request for a continuance as untimely and for failing to show appellant needed more discovery to oppose respondents' motion.[3] Noting that appellant had not filed a separate statement of facts, the court stated the absence of such a statement allowed it to grant summary judgment. (Code Civ. Proc., § 437c, subd. (b)(3).) Turning nevertheless to the merits of respondents' motion, it found respondents were additionally entitled to summary judgment because appellant had not established prima facie cases of discrimination, retaliation, or harassment since respondents had legitimate, nondiscriminatory reasons for their actions toward him. The court also found appellant suffered no substantial or detrimental employment decisions. Finally, it found all of respondents' purportedly defamatory statements were privileged. The court entered judgment for respondents.

Appellant moved for a new trial. He argued the court erred in denying him a continuance to take more discovery to prepare his opposition. In support of his motion for a new trial, he filed as "newly discovered evidence" a separate statement of facts with

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3 The court also ruled on each of appellant's evidentiary objections, but appellant put few of his objections in the appellate record. Accordingly, we do not know which parts of respondents' evidence the court admitted and which it rejected.

495 pages of declarations and exhibits he claims he would have filed in opposition to respondents' summary judgment motion if he had not run out of time before the hearing. Appellant attributed his tardiness in filing a separate statement to his abatement of discovery for three weeks in April while the parties pursued mediation and settlement before the summary judgment hearing at the end of May. Citing our first opinion where we had favorably discussed appellant's having continued depositions to let opposing counsel take a vacation, he suggested his three week suspension of discovery entitled him to similarly favorable consideration from the trial court once again. The court denied appellant's motion for new trial. This appeal followed.

DISCUSSION

1. *Denial of Continuance for More Discovery*

Appellant contends our first opinion established as the law of the case that he was entitled to a continuance if he needed one. In support, he cites our opinion's observation that the law prefers to decide cases on their merits instead of dismissing them for procedural defects. He concludes the trial court thus abused its discretion by denying him a continuance to conduct additional discovery. (*Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 596 [review denial for abuse of discretion]; *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.)

Appellant mistakenly concludes our opinion excused him from needing to be diligent in taking discovery, that procedural rules in opposing summary judgment need not be applied strictly, or that the abuse of discretion standard of review did not apply to the trial court's denial of a continuance. In our first opinion, we gave him the benefit of the doubt in a close case against what we thought was the trial court's hypertechnical insistence on greater specificity in his declaration about his need to take more discovery. Here, the trial court denied him a second continuance of the summary judgment hearing after granting a one month continuance from April to May 2005. The court denied a second continuance because appellant's supporting declaration did not describe the

essential facts he needed to oppose summary judgment. Instead, he asserted he needed a continuance in order to possibly discover impeachment evidence from deposition witnesses, which is insufficient detail. (*California Auto. Ins. Co. v. Hogan* (2003) 112 Cal.App.4th 1292, 1305 [declaration in support of continuance must identify facts essential to opposition to summary judgment].) The court also denied the continuance because it concluded appellant had not been diligent in taking discovery during the 15 months before the first summary judgment and the 8 months since our remand from the first appeal – a conclusion the record permits. (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 257 [majority view requires diligence]; but see *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 638 [no diligence requirement for continuance under old summary judgment time limits where moving party gave only 30 days notice of motion for summary judgment]; *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 393 [same].)

Appellant contends the trial court's refusal to grant a continuance punished him for the three weeks that he suspended discovery while the parties pursued mediation and possible settlement. He likens those three weeks to his agreement before the first motion for summary judgment to postpone discovery to let opposing counsel take a vacation, a professional courtesy we praised in our first opinion. He contends similar considerations of comity and civility should again weigh in favor of a continuance here. The trial court could reasonably find, however, that the two situations were dissimilar because the three week hiatus in April 2005 still gave appellant more than two years to conduct discovery while the case was pending in the trial court. Appellant contends he was diligent because he took depositions of 14 witnesses over 19 sessions in April and May 2005 after respondents filed their motion for summary judgment. We do not discount the amount of work appellant's counsel undertook during that time period. But the trial court could, without abusing its discretion, reasonably conclude that leaving depositions to the last weeks before a summary judgment hearing was not sufficient diligence. Up to then, appellant had taken only two depositions, both in 2002 before the first motion for

summary judgment. The court did not abuse its discretion in denying a second continuance.

2. *Granting Summary Judgment Because No Separate Statement*

Appellant contends the court erred to the extent it granted summary judgment for his not filing a separate statement in opposition to respondents' motion. The court did not abuse its discretion. The summary judgment statute expressly allows the court to grant summary judgment if there is no separate statement. (Code Civ. Proc., § 437, subd. (b)(3).) Appellant contends granting summary judgment because he did not file a separate statement was an abuse of discretion because it was a terminating sanction for his counsel's procedural mistake. In support he cites several authorities, which do not support him.

He cites *Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152, which reversed a summary judgment where the opposing party did not file a separate statement. That case is distinguishable, however, because the opposing party reasonably relied on the trial court's "local" local rule obligating the parties to file a joint statement of stipulated and disputed facts instead of separate statements. (*Id.* at pp. 1154, 1158.)

He also cites *Security Pacific Nat. Bank v. Bradley* (1992) 4 Cal.App.4th 89. There the moving party filed an amended motion for summary judgment after withdrawing its original motion. The opposing party had filed a separate statement to the first motion, but did not file a second separate statement for the amended motion, electing to stand on its first statement. The appellate court found the trial court erred in granting summary judgment based on the opposing party's failure to file a second separate statement. (*Id.* at pp. 92, 95, 98.)

Finally, appellant cites *Parkview Villas Ass'n., Inc. v. State Farm Fire and Cas. Co.* (2005) 133 Cal.App.4th 1197, which reversed a summary judgment. It is distinguishable because the opposing party filed a separate statement of facts, but the trial court found it inadequate because it contained defective references to supporting declarations. (*Id.* at pp. 1202, 1204.) Although the poorly cross-referenced declarations

contained disputed facts, the trial court ignored those facts, reciting the adage that if a fact is not in the separate statement it does not exist. The court thus refused to find the separate statement (or declarations) created triable issues. (*Id.* at pp. 1207-1208.) Here, in contrast, appellant did not file for the summary judgment hearing a separate statement, with or without declarations.

3. *No Triable Issues Identified in Opposition to Summary Judgment*

Appellant contends the court erred in granting summary judgment because there were triable issues of material fact. To prove the existence of triable issues, he cites the evidence he submitted with his motion for new trial. We must review the correctness of the trial court's ruling at the time it granted summary judgment. Because the new trial evidence was not before the court when it heard respondents' motion for summary judgment, we cannot rely on that evidence in analyzing the court's ruling. (*L&B Real Estate v. Superior Court* (1998) 67 Cal.App.4th 1342, 1346.) That absence of evidence informs the following analysis of appellant's causes of action.

a. *Cause of Action for Religious Discrimination*

Appellant objected to the Ensemble and the mural of Jesus Christ because he believed their existence at Camp Afflerbaugh violated the separation of church and state. That separation is properly deemed a political tenet or constitutional doctrine involving government and religion. Although one's view about government's proper relationship with religion is a belief *about* religion, appellant cites no authority it *is* a religion.

As for appellant's contention that agnosticism is a religious belief or creed, we need not decide that question. We assume for the sake of argument that an employer ordinarily may not discriminate against an employee because of the employee's lack of religious faith. (*Walz v. Tax Commission* (1970) 397 U.S. 664, 669; *Ex parte Jentzsch* (1896) 112 Cal. 468, 472.) But even with that assumption, appellant cannot establish a prima facie case of religious discrimination because he did not rebut at the summary judgment hearing respondents' evidence that they did not know of his agnosticism. As

respondents were unaware of appellant's beliefs, appellant cannot make a prima facie case that he suffered job discrimination because he was an agnostic.

b. *Causes of Action for Failure to Prevent Discrimination and to Accommodate*

These causes of action rise and fall with appellant's cause of action for discrimination: If he cannot prove discrimination, respondents are not liable for failing to prevent something we are obligated to assume did not happen. Likewise, if respondents did know appellant's religious beliefs or affiliation, respondents cannot accommodate them.

Appellant contends that even if respondents did not know of his agnosticism, they should have surmised that his objections to the mural and the Ensemble were based on his religious beliefs or sentiments and therefore accommodated him. Whatever respondents may have surmised, the undisputed evidence is they in fact accommodated him. The county painted over the mural after appellant complained, and assigned him no responsibilities for the Ensemble.

c. *Cause of Action for Religious Harassment*

Because respondents did not know appellant's religious affiliation or beliefs, they could not have harassed him about them. But even if they had known his religious views, appellant did not offer admissible evidence in a separate statement of facts opposing the motion for summary judgment which showed their purported harassment was sufficiently severe to alter the conditions of his employment or create a hostile work environment. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130-131; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608.) Finally, personnel decisions by management – which are the lion's share of appellant's harassment allegations – are as a matter of law not harassment. (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 63-65.) Hence, appellant's complaints about an allegedly improper

suspension from work in October 2000 and insufficient time off work on two days in the fall of 1999 do not create triable issues of harassment.[4]

d. *Causes of Action for Retaliation*

Respondents concede appellant engaged in protected activity when he filed his grievances about the mural and Ensemble. FEHA prohibits an employer from retaliating against an employee who engages in protected activity, and the Labor Code similarly protects an employee who complains about an employer's legal violations. (Gov. Code, § 12940, subd. (h); Lab. Code, § 1102.5) Appellant's failure to file a separate statement of facts in opposition to respondents' motion for summary judgment means, however, that the trial court was entitled to find he did not create a triable issue of material fact that respondents retaliated against him.

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[4] Appellant alleged in the operative complaint the following instances of harassment, but failed to support his claims with admissible evidence in a separate statement of facts at the summary judgment hearing:

- In January 1999, the department notified appellant he was to be suspended from work for 20 days. Before he began to serve the suspension, however, the department reduced its length to nine days, and then withdrew it completely so that he served no suspension at all.
- Appellant complained of twice being assigned in the fall of 1999 to late night and early morning shifts with only eight hours between them, not allowing him sufficient time to sleep. After he complained, respondents arranged his schedule so that he always had enough time between shifts to sleep.
- In October 2000, the county suspended appellant for 10 days without pay for filing with the juvenile court false information about a number of juvenile wards. The Civil Service commission rejected appellant's administrative appeal, and the superior court denied appellant's petition for a writ of administrative mandate seeking to overturn the suspension.
- Respondent Cox once threatened to have appellant's car towed from the camp's parking lot because appellant had not moved it in two weeks, but did not tow it.

e. *Cause of Action for Defamation*

Appellant alleges respondent Barnes defamed him by filing a false police report accusing him of child abuse. He alleges respondents also defamed him by criticizing his work, and that respondent Barnes in particular defamed him when he said appellant was a "pathetic human being" and "the most ignorant person I know," and if appellant did not like his job, he ought to quit. The trial court found these statements were privileged statements made in an official proceeding (the police report) or among interested parties (internal criticisms of his work) that could not support a defamation claim. (Civ. Code, § 47, subd. (b).) Appellant contends the privilege did not apply because respondents made their statements with malice, but other than to assert malice, he offered no admissible evidence in a separate statement of facts at the hearing on the motion for summary judgment to make the existence of malice a triable issue. Additionally, Barnes's alleged insulting remarks about appellant were expressions of opinion, not provable facts, and for that reason, too, could not support a defamation claim. (*Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 970 [defamation is false statement of provable fact, not opinion].)

4. *Motion for New Trial*

A court may grant a new trial for any of the reasons identified in Code of Civil Procedure section 657, one of which is newly discovered evidence. (§ 657, subd. (4).) In moving for a new trial, appellant offered as "new evidence" the deposition testimony and exhibits he had for lack of time not filed with his opposition to the motion for summary judgment. The trial court denied the motion for new trial because it found appellant had not been diligent in attempting to produce that evidence earlier.[5] Appellant contends the

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[5] The court deemed appellant's motion to be one for reconsideration, but because he filed it after the court entered judgment, it was properly styled as a motion for new trial. (6 Witkin Procedure (4th ed. 1997) Proceedings Without Trial, §§ 228 & 232.) The difference does not matter here, however, because the court's ruling turned on appellant's lack of diligence, which both motions require.

court erred in denying his motion for new trial because no diligence requirement applied. We disagree. The new trial statute expressly states a court may grant a new trial for "Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial." (§ 657, subd. (4).)

DISPOSITION

The judgment is affirmed. Respondents to recover their costs on appeal.

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RUBIN, J.

WE CONCUR:

COOPER, P. J.

BOLAND, J.